

89-172

Supreme Court, U.S.

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No.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

COMMERCIAL CREDIT EQUIPMENT CORPORATION,

Petitioner,

v.

MARION J. STAMPS,

Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

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QUESTION PRESENTED

Does Rule 4(a)(4) of the Federal Rules of Appellate Procedure permit or require the filing of a notice of appeal more than 30 days after the entry of an order denying a new trial where there are multiple post-trial motions filed and there has been no disposition of one of them?

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IN THE
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COMMERCIAL CREDIT EQUIPMENT CORPORATION,
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v.

MARION J. STAMPS,
Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

Petitioner, Commercial Credit Equipment Corporation¹, prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Seventh Circuit entered on May 8, 1989, dismissing appeals docketed as Case Nos. 88-3326 and 88-3436.

OPINIONS AND ORDERS BELOW

The opinions in the courts below are unreported. The order of the United States Court of Appeals for the

¹ Commercial Credit is indirectly a wholly-owned subsidiary of Primerica Corporation.

Seventh Circuit dismissing the appeals docketed as Case Nos. 88-3326 and 88-3436 is set forth in Appendix A. The order of the United States Court of Appeals for the Seventh Circuit requiring the petitioner to file a brief memorandum stating why the appeal docketed as Case No. 88-3436 should not be dismissed for lack of jurisdiction is set forth in Appendix B. The order of the United States District Court for the Northern District of Illinois granting the petitioner's motion to alter or amend judgment is set forth in Appendix C. The memorandum opinion and order of the United States District Court for the Northern District of Illinois granting the respondent's motion to approve his bill of costs and for prejudgment interest is set forth in Appendix D. The order of the United States District Court for the Northern District of Illinois denying the petitioner's motion for judgment notwithstanding the verdicts and/or motion for new trial is set forth in Appendix E.

JURISDICTION

The order of the United States Court of Appeals for the Seventh Circuit sought to be reviewed was dated and entered on May 8, 1989. No rehearing or extension of time was requested. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTE AND RULE INVOLVED

The statute and rule here involved provide, in pertinent part, as follows:

Title 28 United States Code §1291

“The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.”

Rule 4(a)(1) and 4(a)(4), Federal Rules of Appellate Procedure

“(1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted.

* * *

(4) If a timely motion under the Federal Rules of Civil Procedures is filed in the district court by any party: (i)

for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing."

STATEMENT OF THE CASE

On November 15, 1985, the petitioner, Commercial Credit Equipment Corporation (Commercial Credit), a Delaware corporation with its principal place of business in Baltimore, Maryland, filed a complaint in the United States District Court for the Northern District of Illinois against the respondent, Marion J. Stamps (Stamps), an Illinois citizen, seeking a declaration of rights concerning the obligation of Stamps for a balance due on a commercial loan which exceeded \$10,000, exclusive of interest and costs. The district court had diversity jurisdiction under Title 28 U.S.C. §1332(a)(2).

On November 20, 1986, Stamps filed his answer to Commercial Credit's complaint. At the same time, Stamps filed a counterclaim against Commercial Credit. After challenges to the original counterclaim by Commercial Credit, Stamps eventually filed a three-count second amended counterclaim, alleging conspiracy, fraud, and conversion.

Trial commenced on August 30, 1988. On September 7, 1988, the jury returned general verdicts in favor of Stamps and against Commercial Credit on its complaint and on Stamps's second amended counterclaim, and awarded Stamps compensatory damages in the amount of \$82,500 and punitive damages in the amount of \$125,000. On September 7, 1988, the district court entered judgment on both verdicts.

On September 19, 1988, Commercial Credit served upon Stamps's counsel a timely motion for judgment notwithstanding the verdicts and/or motion for a new trial and Stamps served upon Commercial Credit's counsel a timely motion to approve his bill of costs and for prejudgment interest.

On September 20, 1988, Commercial Credit served upon Stamps's counsel a timely motion to alter or amend the September 7, 1988 judgment by reducing the jury's award of compensatory damages to reflect \$3,000 received by Stamps pursuant to his settlement agreement with a third-party defendant.

On November 2, 1988, the district court denied Commercial Credit's motion for judgment notwithstanding the verdicts and/or motion for new trial.

On November 30, 1988, Commercial Credit filed a notice of appeal from the November 2, 1988 order, which appeal was docketed as Case No. 88-3326.

On December 7, 1988, the district court granted Stamps's motion to approve his bill of costs and for prejudgment interest.

On December 13, 1988, Commercial Credit filed a notice of appeal from the December 7, 1988 order, which appeal was docketed as Case No. 88-3436.

On February 9, 1989, Stamps filed a motion to dismiss the appeal docketed as Case No. 88-3326, alleging that the notice of appeal filed on November 30, 1988 was ineffective under Rule 4(a)(4) of the Federal Rules of Appellate Procedure because it was filed before the district court's disposition of Stamps's post-trial motion to approve his bill of costs and for prejudgment interest.

On February 21, 1989, the district court granted Commercial Credit's motion to alter or amend the September 7, 1988 judgment.

On February 24, 1989, Commercial Credit filed a response to the motion to dismiss the appeal docketed as Case No. 88-3326.

On March 10, 1989, Commercial Credit filed a notice of appeal from (a) the September and December 1988 judgments and orders, (b) the November 2, 1988 order denying Commercial Credit's motion for judgment notwithstanding the verdicts and/or motion for new trial and (c) the February 21, 1989 order to the extent the district court thereby reaffirmed the judgment on the verdicts against Commercial Credit in the reduced sum of \$204,500. This was Commercial Credit's third appeal. It was docketed as Case No. 89-1592.

On March 23, 1989, Stamps filed a notice of cross-appeal from the February 21, 1989 order "to the extent the order (1) was entered or may be deemed to have been entered pursuant to Rule 59 and (2) was entered without leave of the United States Court of Appeals for the Seventh Circuit." Stamps's cross-appeal was docketed as Case No. 89-1645.

On March 23, 1989, the United States Court of Appeals for the Seventh Circuit entered an order in the appeal docketed as Case No. 88-3436 which directed Commercial Credit to file a brief memorandum stating why the appeal should not be dismissed for lack of jurisdiction. The order noted that the district court did not rule on Commercial Credit's motion to alter or amend judgment (filed and served on September 20, 1988) until February 21, 1989; it cited *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 61 (1982) for the proposition that a notice of appeal filed before the court's disposition of a timely Rule 59 motion is automatically void and cannot confer jurisdiction on the court of appeals.

On April 5, 1989, Commercial Credit filed a brief memorandum pursuant to the court of appeals order of March 23, 1989.

On May 8, 1989, the Seventh Circuit dismissed the appeals docketed as Case Nos. 88-3326 and 88-3436. The reason given in the order for the dismissals was as follows:

"After the district court entered its final judgment on September 9, 1988, three motions under Fed.R. Civ. P. were timely filed. The district court ruled on each of these motions separately, entering its last order on February 22, 1989. Plaintiff's two notices of appeal filed before this date (appeals 88-3326 and 88-3436) are void and of no effect. *See* Fed. R. App. P. 4(a)(4). The notices filed subsequent to the district court's February 22, 1989 order, (appeals 89-1592 and 89-1645) however, were timely and bring up the entire case for review."

ARGUMENT

There are three reasons why the Court should grant the petition and review the decision below that a notice of appeal is ineffective which is filed after the entry of an order denying a new trial but before the disposition of all timely filed motions listed in Rule 4(a)(4). First, the decision is inconsistent with the express language of Rule 4(a)(4). Second, the decision is inconsistent with the Court's decision in *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56 (1982). Third, the decision is at odds with this Court's declared public policy to favor interpretations which prevent loss of the right of appeal and to avoid decisions on the basis of mere technicalities.

I.

THE DECISION IS INCONSISTENT WITH THE EXPRESS LANGUAGE OF RULE 4(a)(4).

Rule 4(a)(4) of the Federal Rules of Appellate Procedure, as amended, provides as follows: —

“(4) If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for *all* parties shall run from the entry of *the* order denying a new trial or granting or denying any other such motion. A notice of appeal filed *before* the disposition of *any* of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the *order*

disposing of *the motion* as provided above. No additional fees shall be required for such filing.” (Emphasis added.)

This subparagraph in essence provides that if “a timely motion” of the types described is filed, then the time for appeal shall run from the entry of the order granting or denying the motion. The language is clear. Such a motion must be disposed of before an appeal may be taken. If a notice of appeal is filed before the entry of the order, then a new notice must be filed within the prescribed time measured from the entry of *the* order disposing of *the* motion.

The decision below is inconsistent with this language. The court of appeals read the subparagraph as follows: If timely motions are filed, the time for appeal shall run from the entry of the last order granting or denying one of such motions. All of such motions must be disposed of before an appeal may be taken from any judgment or order. If a notice of appeal is filed before the entry of the order(s) disposing of all of such motions, a new notice must be filed within the prescribed time measured from the entry of the (last of the) order(s) disposing of (one of) such motions. A new notice of appeal does not have to be filed within the prescribed time measured from the entry of the order disposing of such a motion if any other such motion has not been disposed of.”

The Advisory Committee on Appellate Rules could have written subparagraph (a)(4) in a manner consistent with the court of appeals’s decision. If it had (as suggested by the preceding paragraph), then the result would have been a wordier and more cumbersome subparagraph. There would have been no practical difference in many cases if it had done so. In cases involving multiple post-trial motions, most district judges probably do not follow a practice of

disposing of the motions by separate orders entered at month or greater intervals. Only in such situations, as here, would an appealing party have to file multiple notices of appeal in order to bring up for review all judgments or orders appealed from.

It is plain that subparagraph (a)(4) is written in contemplation of a single motion of the described character and requires a party who wishes to appeal from a judgment or order which is the subject of such a motion to do so within the time prescribed in subparagraph (a)(1) measured from the entry of the order disposing of such motion.

There are four sentences in subparagraph (a)(4). The first sentence refers to a post-trial "motion" in the singular; it defines which motions are within the scope of the subparagraph, and it provides that the filing of the motion causes the time prescribed for appeal to run from the entry of "the order" disposing of "such motion." The repeated use of the singular noun makes emphatic that only a single motion and order disposing of the same are contemplated and that when the order is entered the case is then ripe for appeal.

The second sentence simply provides that a notice of appeal filed before the disposition of "any" of such motions shall have no effect. Again, the operative word "any" as used here is singular. Where the committee intended a plural usage it used the word "all" as in the preceding sentence of the subparagraph. A situation which may arise to which this sentence has application involves the filing of a notice of appeal in advance of a timely post-trial motion.

The third sentence prescribes the time in which the notice of appeal must be filed in those cases in which a prior notice was of "no effect" under the terms of the

second sentence because the earlier notice was filed before the disposition of the post-trial motion, whether the motion was made before or after the filing of the notice of appeal. If the motion was filed before the filing of the notice of appeal, then the notice is of no effect when it is filed (*Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56 (1982)); if the motion is made after the filing of the notice of appeal, then the notice, although effective when filed, becomes of no effect upon the timely service of the motion (*Western Industries, Inc. v. Newcor Canada Limited*, 709 F.2d 16 (7th Cir. 1983); cf. 9 J. Moore, B. Ward, & J. Lucas, *Moore's Federal Practice* ¶204.12[1], p. 4-70, n. 17 (1989)).

The fourth sentence simply makes the housekeeping point that a party who has already paid the fees associated with filing a notice of appeal is not required to pay additional fees when filing his new notice of appeal.

As the above analysis indicates, a fair reading of the express language of Rule 4(a)(4) is that a notice of appeal filed before the entry of the order disposing of a post-trial motion is of no effect and a notice of appeal must be filed within the prescribed time from the entry of the order disposing of the post-trial motion.

The Seventh Circuit's dismissal of the appeals docketed as Case Nos. 88-3326 and 88-3436 was based on the erroneous premise that the rule says that a notice of appeal filed before the disposition of *all* of the enumerated motions shall have no effect. If the members of the Advisory Committee on Appellate Rules had desired to require that no notice of appeal be effective until *all* of the motions that the federal rules allow the parties to make within 10 days of the entry of judgment had been disposed of, then it is fair to presume that they would have used that very

word. The committee members were obviously aware of the word "all" when writing this portion of the rule in view of the fact they used it in the preceding sentence. *All* parties must heed the entry of the order denying a new trial or other such motion, not just the party making the motion. If all Rule 4(a)(4) motions must be disposed of before a notice of appeal shall have an effect, then the word "all" is the obvious word for the committee to have used. The language of Rule 4(a)(4) does not support the Seventh Circuit's dismissal of the appeals docketed as Case Nos. 88-3326 and 88-3436.

The impact of the Seventh Circuit's decision that a notice of appeal filed before the disposition of all the motions listed in the rule is ineffective extends beyond the circumstances of the present case. If, unlike the petitioner, a party fails to file a notice of appeal within 30 days of an order denying its post-trial motion to alter or amend judgment, then it runs afoul of the direction in Rule 4(a)(1), as modified by Rule 4(a)(4), that a notice of appeal "shall be filed * * * within 30 days after the entry of the judgment or order appealed from * * *." Certainly, no appeal can be taken from the order denying such party's post-trial motion as to that order if the notice of appeal is not filed within 30 days of the entry of the order; and, a serious question will arise as to whether the underlying judgment is subject to review by a notice of appeal filed after the disposition of all of the remaining Rule 59 motions.

II.

THE SEVENTH CIRCUIT'S ANALYSIS OF RULE 4(a)(4) IS INCONSISTENT WITH THE PRINCIPLES AND REASONING OF *GRIGGS v. PROVIDENT CONSUMER DISCOUNT CO.*

In its March 23, 1989 order, the Seventh Circuit suggested that it might not have jurisdiction because the notices of appeal filed on November 30, 1988 (Case No. 88-3326) and on December 13, 1988 (Case No. 88-3436) might be void because the orders appealed from might not have been final judgments within the meaning of 28 U.S.C. §1291. The suggestion of lack of finality was based on the Seventh Circuit's analysis of *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 61 (1982), and the fact that Commercial Credit's motion to alter or amend judgment, filed and served on September 20, 1988, was not ruled on by the district court until February 21, 1989.

The facts in the *Griggs* case were that the defendant filed a timely Rule 59 motion to alter or amend judgment on November 12, 1981. The defendant's notice of appeal was filed seven days later *before* the district court disposed of the defendant's Rule 59 motion. The Rule 59 motion was disposed of on November 23, 1981, four days *after* the notice of appeal was filed. In its *per curiam* decision, this Court, quoting from Rule 4(a)(4), held that the notice was ineffective to provide the court of appeals with jurisdiction.

The *Griggs* analysis is inapplicable to the present case, however, because in each of the appeals to the Seventh Circuit the notice was *not* filed before the disposition of any Rule 59 motion. In each appeal, the notice was filed *after* the disposition of such a motion.

In Case No. 88-3436, the notice of appeal was filed by the petitioner on December 13, 1988; a timely Rule 59 motion, namely the respondent's motion to approve his bill of costs and for prejudgment interest filed on September 19, 1988, was disposed of by the district court on December 7, 1988, six days *before* the filing of the notice of appeal.

In Case No. 88-3326, the notice of appeal was filed by the petitioner on November 30, 1988; a timely Rule 59 motion, specifically the petitioner's motion for judgment notwithstanding the verdict and/or motion for new trial filed September 19, 1988, was disposed of by the district court on November 2, 1988, 28 days *before* the filing of the notice of appeal.

In the *Griggs* opinion, the Court quotes the language of Rule 4(a)(4) that "the time for appeal for all parties shall run from the entry of the order denying * * * such motion. A notice of appeal filed before the disposition of [such motion] shall have no effect." 459 U.S. at 60. The opinion thus makes clear that a post-trial motion must be disposed of before a notice of appeal shall have an effect. The opinion does not state that where there are multiple post-trial motions all must be disposed of before a notice of appeal shall have an effect. The language of the opinion, like the rule, is in the singular.

The Court also quoted in the *Griggs* opinion the third sentence of subparagraph 4(a)(4) as follows: "A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above." 459 U.S. at 60. This sentence, reinforcing the requirements of subparagraph 4(a)(1), makes it plain that a party *must* file a notice of appeal within the prescribed time after entry of the order disposing of

the motion if the party desires appellate review. The petitioner, Commercial Credit, was thus *required* by the last-quoted sentence to file its notices of appeal within 30 days of the entry of the order disposing of its motion for judgment notwithstanding the verdicts and/or motion for a new trial (Case No. 88-3326) and within 30 days of the entry of the order disposing of the respondent's motion to approve his bill of costs and for prejudgment interest (Case No. 88-3436). In each case, Commercial Credit filed its notices of appeal as required by Rule 4(a)(4) and consistent with the rule stated in the *Griggs* opinion.

The Seventh Circuit's reliance on the *Griggs* decision was thus in error because that case involved a factual situation where the appellant filed its notice of appeal before the disposition of *any* Rule 59 motion. The decisions which repeatedly and properly apply the language of Rule 4(a)(4) to notices of appeal which are filed *before* the disposition of *any* Rule 59 motion simply do not deal with situations where multiple Rule 59 motions are filed and the district court decides the motions *seriatim*. In such a situation, a party who wishes to appeal is compelled by the penultimate sentence of subparagraph 4(a)(4) to file multiple notices if the time gap in disposition of the Rule 59 motions is too great or else lose his right of appeal.

III.

THE SEVENTH CIRCUIT'S ANALYSIS OF RULE 4(a)(4) IS CONTRARY TO PUBLIC POLICY.

In *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 387 (1978), this Court quoted with approval its statement in *Foman v. Davis*, 371 U.S. 178, 181 (1962) that "[i]t is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits

to be avoided on the basis of such mere technicalities." In *Bankers Trust Co.*, the Court also quoted from Professor Moore's commentary on Rule 58, which states that "[t]he rule should be interpreted to prevent loss of the right of appeal, not to facilitate loss." 435 U.S. at 386.

In *Foman v. Davis*, 371 U.S. 178 (1962), two notices of appeal were filed, the first from an adverse judgment and the second from the denial of the petitioner's motions to vacate the judgment and to amend the complaint. The court of appeals held the second notice of appeal to be ineffective to review the judgment "because the notice failed to specify that the appeal was being taken from that judgment as well as from the orders denying the motions." 371 U.S. at 180-81. This Court reversed the court of appeals, stating that "[t]he defect in the second notice of appeal did not mislead or prejudice the respondent" and that "decisions on the merits [are not] to be avoided on the basis of such mere technicalities." 371 U.S. at 181. Quoting from its opinion in *Conley v. Gibson*, 355 U.S. 41, 48 (1957), the Court further stated that "[t]he Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." 371 U.S. at 181-82.

The Seventh Circuit's decision dismissing the two appeals is out of step with the policy positions enunciated by this Court favoring rule interpretation which prevents loss of the right of appeal and disfavoring decisions which rely on mere technicalities to avoid decisions on the merits. If the *Bankers Trust Co.* and *Foman* decisions are sound, then the Seventh Circuit's analysis of Rule 4(a)(4) is contrary to public policy.

This Court's discretion is invoked in light of its Rule 17.1(c). To the extent that this Court has spoken to the question the decision of the court of appeals is in conflict with this Court's decisions in *Foman v. Davis*, 371 U.S. 178 (1962), *Bankers Trust Co. v. Mallis*, 435 U.S. 381 (1978), and *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56 (1982). To the extent that this Court has not spoken to the issue the question of the proper interpretation of Rule 4(a)(4), where multiple motions thereunder have been filed, is an important question which should be settled by this Court.

For the reasons stated this petition should be granted.

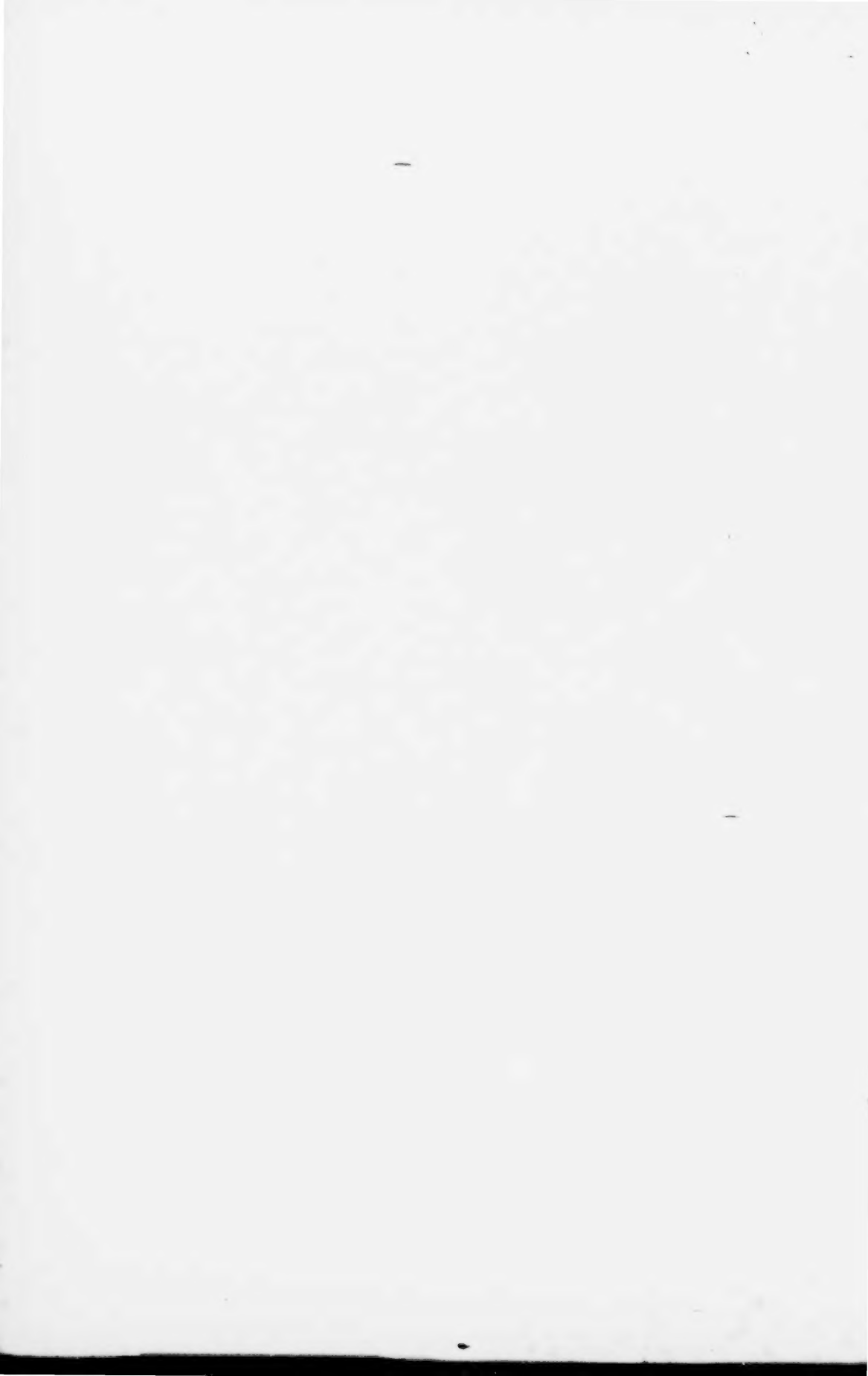
Respectfully submitted,

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APPENDICES



A-1

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

May 8, 1989.

Before

Hon. RICHARD D. CUDAHY, *Circuit Judge*
Hon. RICHARD A. POSNER, *Circuit Judge*
Hon. JOHN L. COFFEY, *Circuit Judge*

Nos. 88-3326, 88-3436, 89-1592, 89-1645

COMMERCIAL CREDIT EQUIPMENT CORPORATION,
a Delaware corporation,

Plaintiff-Appellant, Cross-Appellee,

vs.

MARION J. STAMPS,

Defendant-Appellee, Cross-Appellant.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 85 C 9672—Judge **Harry D. Leinenweber.**

This matter comes before the court for its consideration of the following documents:

1. The "MOTION TO DISMISS DOCKET NO. 88-3326" filed herein on February 9, 1989.
2. The "RESPONSE TO MOTION TO DISMISS DOCKET NO. 88-3326" filed herein on February 24, 1989.
3. The "MOTION FOR LEAVE TO FILE REPLY IN SUPPORT OF MOTION TO DISMISS" filed herein on March 7, 1989.
4. The "REPLY IN SUPPORT OF MOTION TO DISMISS" filed herein on May 8, 1989.
5. The "MOTION FOR LEAVE TO FILE CORRECTED APPELLEE'S JURISDICTIONAL STATEMENT" filed herein on March 12, 1989.
6. The "APPELLEE'S JURISDICTIONAL STATEMENT (CORRECTED)" filed herein on May 8, 1989.
7. The "OBJECTION AND REJOINDER TO STAMPS' MOTION FOR LEAVE TO FILE REPLY IN SUPPORT OF MOTION TO DISMISS" filed herein on March 13, 1989.
8. The "PLAINTIFF'S BRIEF MEMORANDUM PURSUANT TO ORDER OF MARCH 23, 1989 DOCKET NO. 88-3436" filed herein on April 5, 1989.
9. The "PLAINTIFF'S BRIEF MEMORANDUM PURSUANT TO ORDER OF MARCH 23, 1989" filed herein on April 5, 1989.

On consideration thereof,

IT IS ORDERED that the "MOTION FOR LEAVE TO FILE REPLY IN SUPPORT OF MOTION TO DISMISS" and the "MOTION FOR LEAVE TO FILE CORRECTED APPELLEE'S JURISDICTIONAL STATEMENT" are GRANTED and the clerk of this court is directed to file the "REPLY IN SUPPORT OF MOTION TO DISMISS" and the "APPELLEE'S JURISDICTIONAL STATEMENT (CORRECTED)" instanter.

After the district court entered its final judgment on September 9, 1988, three motions under Fed. R. Civ. P. 59 were timely filed. The district court ruled on each of these motions separately, entering its last order on February 22, 1989. Plaintiff's two notices of appeal filed before this date (appeals 88-3326 and 88-3436) are void and of no effect. *See* Fed. R. App. P. 4(a)(4). The notices filed subsequent to the district court's February 22, 1989 order, (appeals 89-1592 and 89-1645) however, were timely and bring up the entire case for review. Accordingly,

IT IS ORDERED that appeals 88-3326 and 88-3436 are DISMISSED.

IT IS FURTHER ORDERED that briefing in consolidated appeals 89-1592 and 89-1645 will proceed as follows:

1. Plaintiff shall file an opening brief and required short appendix in the main appeal docketed in 89-1592 by no later than May 26, 1989.
2. Defendant shall file a combined responsive brief in the main appeal and opening brief and appendix in the cross-appeal docketed in 89-1645 by June 26, 1989.
3. Plaintiff shall file a combined reply brief in the main appeal and responsive brief in the cross-appeal by July 19, 1989.
4. Defendant shall file a reply brief in the cross-appeal, if any, by August 2, 1989.



B-1

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

March 23, 1989.

By the Court:

COMMERCIAL CREDIT EQUIPMENT CORPORATION,
a Delaware corporation,

Plaintiff-Appellant,

No. 88-3436

v.

MARION J. STAMPS,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 85 C 9672—Hon. **Harry D. Leinenweber**, Judge.

ORDER

A preliminary review of the short record indicates that the order appealed from may not be a final judgment within the meaning of 28 U.S.C. § 1291. A notice of appeal filed before the court's disposition of a timely Rule 59 motion is automatically void and cannot confer jurisdiction on the court of appeals. See *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 61 (1982). The district

court in the present case did not rule on plaintiff's motion to alter or amend judgment (filed and served on September 20, 1988) until February 21, 1989; therefore it appears that the notice of appeal filed December 13, 1988 (and the one filed November 30, 1988) are void. Accordingly,

IT IS ORDERED that plaintiff-appellant shall file, on or before April 5, 1989, a brief memorandum stating why this appeal should not be dismissed for lack of jurisdiction. A motion for voluntary dismissal pursuant to Fed. R. App. P. 42(b) will satisfy this requirement. Briefing shall be held in abeyance pending further court order.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 85 C 9672 Date: February 21, 1989
Name of Assigned Judge: HARRY D. LEINENWEBER
Case Title: Commercial Credit Equipment Corporation
v. Marion J. Stamps

* * * * *

MOTION:

PLAINTIFF'S MOTION TO ALTER OR AMEND
JUDGMENT filed and served on September 20, 1988.

DOCKET ENTRY:

- (1) ☐ Judgment is entered as follows:
- (2) ☒ [Other docket entry:]

Plaintiff's motion to amend the September 7, 1988, judgment entered against Commercial Credit by reducing the jury's award of compensatory damages to reflect funds received by Marion J. Stamps pursuant to the settlement agreement with Carson Green is granted.

* * * * *

[Docketed February 22, 1989]

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

COMMERCIAL CREDIT EQUIPMENT CORPORATION,
a Delaware corporation,

Plaintiff/Counterdefendant,

v.

MARION J. STAMPS,

Defendant/Counterplaintiff.

MARION J. STAMPS,

Defendant and Third-party plaintiff,

v.

FRANCIS RICHARDSON, CARSON GREENE,
LARRY PAYNE and CHARLOTTE HOORMANN,

Third-party defendants.

No. 85 C 9672
JUDGE LEINENWEBER

MEMORANDUM OPINION AND ORDER

This cause is before the court on the motion of defendant/counterplaintiff, Marion J. Stamps ("Stamps"), to approve its bill of costs in the amount of \$6,677.44 and for

prejudgment interest against plaintiff, Commercial Credit Equipment Corporation ("CCEC").

Fed.R.Civ.P 54(d) provides that "costs shall be allowed as of course to the prevailing party unless the district court otherwise directs . . ." Allowable items of costs are set forth in 28 U.S.C. § 1920, 28 U.S.C. §1821, and General Rule 45(b) of the Northern District of Illinois.

Many of CCEC's objections are cured by the filing of Stamps' attorney, Mark Schoenfield's ("Schoenfield"), affidavit, specifically the objections regarding the lack of particularized information.

CCEC first objects to the \$1,078.81 Stamps allegedly incurred for photocopying. All of the objections to the photocopying costs are cured by Schoenfield; the affidavit identifies the documents, justifies their use and provides the cost and amount of copies.

CCEC also objects to the taxing of the \$2,475 expense incurred by Stamps in videotaping and replaying the depositions of Franc Richardson ("Richardson") and Philip Kaiser as a cost. The depositions were taken pursuant to court order and were necessary for trial. Therefore the court will allow the costs to be recovered. Additionally, the stenographic transcription fee is also recoverable as transcription was necessary for the attorneys to decide what to present to the jury and enabled them to deal with objections before the videotape was shown to the jury.

Stamps seeks to recover \$510 in travel fees for Richardson. CCEC contends that Stamps has not met the requirements for receiving witness travel cost. Schoenfield's affidavit contains all of the information necessary to recover this cost under 28 U.S.C. §1821(c)(1).

Stamps may also recover the cost of stenographic transcription of the depositions in the amount of \$2,297. Stamps has asserted that the costs did not exceed the cost of an original and one copy, were charged at the customary rate, and were necessary for use in the case to refresh recollection and to respond to objections.

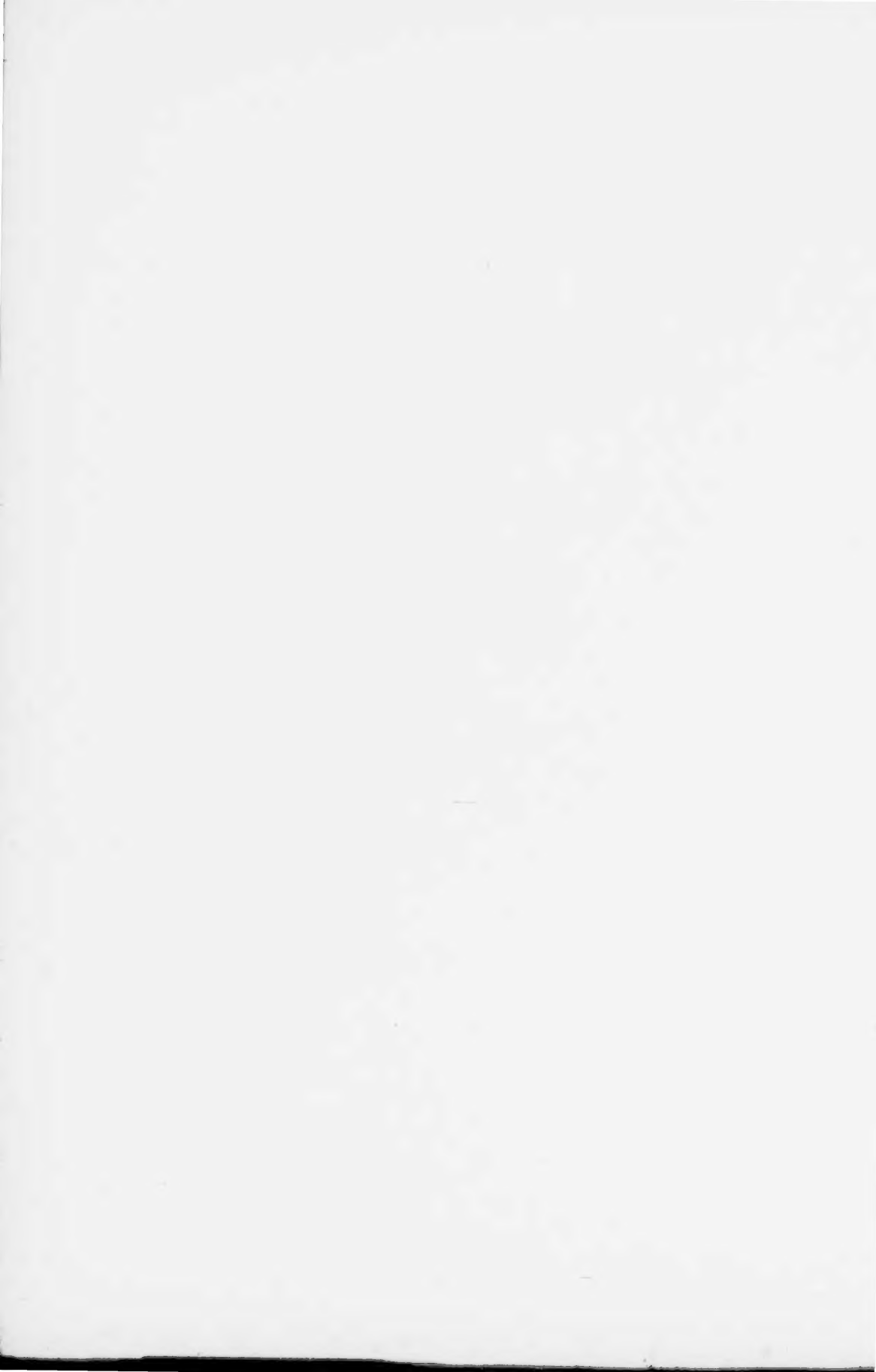
Finally, CCEC objects to the assessment of prejudgment interest arguing that 1) Stamps failed to establish a *prima facie* case of conversion; and 2) interest is recoverable only if there was an unreasonable and vexatious delay of payment. The court agrees with Stamps that it is entitled to prejudgment interest. With respect to the first argument, the jury has already found CCEC liable for conversion. In addition, the jury awarded punitive damages. The award of punitive damages was based on the malicious conduct of CCEC. Such a finding is sufficient to support a finding of unreasonable and vexatious delay of payment. See *Chgo. Title & Trust Co. v. 1st Arlington Natl. Bank*, 454 N.E.2d 723, 731, 118 Ill.App.3d 401 (1st Dist. 1983).

Accordingly, the motion to approve costs and for prejudgment interest is granted.

IT IS SO ORDERED.

/s/ Harry D. Leinenweber
Judge
United States District Court

DATED: DEC 7 1988



APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 85 C 9672 Date: November 2, 1988
Name of Assigned Judge: HARRY D. LEINENWEBER
Case Title: Commercial Credit vs. Stamps

* * * * *

DOCKET ENTRY:

(1) ☐ Judgment is entered as follows:

(2) ☒ [Other docket entry:]

Plaintiff and counter-defendant's motion for judgment notwithstanding the verdict or for a new trial is denied, for the reasons stated in open court. Plaintiff given to and including November 9, 1988 to file supplemental bond.

* * * * *

[Docketed November 3, 1988]